UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CALIFORNIA INSTITUTE OF TECHNOLOGY **JET PROPULSION LABORATORY**	CASE NOS.	31-CA-030208 31-CA-030249 31-CA-030293 31-CA-030326 31-CA-088775
and		
DENNIS BYRNES, an Individual		
and		
SCOTT MAXWELL, an Individual		
and		
LARRY D'ADDARIO, an Individual		
and		
ROBERT NELSON, an Individual		
and		
WILLIAM BRUCE BANERDT, an Individual		

JET PROPULSION LABORATORY'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM G. KOCOL

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I. THERE IS NO REASONABLE DISPUTE THAT JPL LACKED CONTROL OVER NASA'S BADGING PROGRAM.

JPL has shown that Judge Kocol's conclusion regarding JPL's supposed "control" over NASA's badging program lacked ***any*** basis in the record. The evidence actually showed the opposite. To assist the Board, JPL's brief carefully identified the testimony and documents showing its *lack* of control. The Charging Parties' own admissions are the most telling --- specifically, that the badging program was "NASA's choice" (D'Addario's testimony), "forced on JPL" (Nelson's written description), and what "NASA required . . . not JPL" (Banerdt's testimony). The GC's opposition ignores these admissions by the Charging Parties that the badging program was beyond JPL's control.

Instead, the GC's opposition makes baseless assertions to support the ruling. First, the GC wrongly conflates JPL and NASA --- two totally separate entities --- to deflect attention from JPL's lack of control: "the evidence shows that ***[JPL] and NASA*** had at least some discretion in implementing the badging requirement." Opposition at 2 (emphasis added). There is no basis for combining the two as though they were jointly responsible.

Second, the GC speculates --- without any basis whatsoever --- that JPL must have been able to influence how NASA officials implemented the badging program, simply because it is a NASA contractor. Not only is this unsupported by the record, it defies common sense. Contractors like JPL rely for their very existence on the government agency that funds them. JPL certainly was not in a position to direct how NASA complied with federal law.

Third, the GC contends that JPL's supposed control over NASA is revealed by an unremarkable observation by JPL's Deputy Director, after the Supreme Court ruling, that JPL "will need to work with NASA" to determine how NASA's legal victory would affect the badging process, particularly for "badging applications currently in the system." Opposition

at 4-5. Of course JPL expressed its desire to work ***with*** NASA to implement NASA's requirements. Working ***against*** NASA certainly was not an option. That does not suggest control.

Finally, the GC claims that a handful of irrelevant emails sent in ***2007*** establish that the Charging Parties' ***2011*** emails were protected. Specifically, the GC cites (1) an email in which Nelson muses over how JPL would be forced to handle employees who refused to comply with NASA's requirements, (2) an email announcement by JPL management reminding employees to show the same respect for the JPL employees who had to communicate the details of NASA's badging program to the workforce as they would for JPL's Deputy Director, and (3) emails showing that JPL hosted town hall meetings to answer employees' questions about NASA's new rules. Opposition at 4-5. Of course, none of that 2007 conduct is relevant to whether emails sent four years later are protected. But even more importantly, these emails simply show the difficulties JPL faced in coping with the new requirements that NASA was imposing. Nothing more. They are certainly not evidence of control.

The GC cites cases in which employers made changes affecting workers to comply with the law, and the changes were found to be bargainable terms and conditions. However, the employers in all of those cases had real discretion over implementation. *See Trojan Yacht*, 319 NLRB 741 (1995) (in freezing benefits accruals to comply with new tax laws, the employer could and did choose how to implement the freeze from among four possibilities); *Hanes Corp.*, 260 NLRB 557 (1982) (while OSHA required employees to wear respirators, employer had "significant flexibility and latitude in implementing steps necessary for compliance," including choosing the respirator model, who would pay the respirator cost, and whether to require changes to grooming standards); *Dickerson-Chapman*, 313 NLRB 907 (1994) (OSHA required that the

employer designate a "competent person" to inspect the site; employer had full discretion over who was chosen and how); *Warren Unilube*, 358 NLRB No. 92 (2012) (OSHA required the employer's workplace be free of serious hazards; the employer decided what rules it would implement to keep the workplace safe, such as a ban on all cell phones, radios, etc. in designated areas).

This case is demonstrably different. The Charging Parties' quarrel with the badging requirement was that information NASA required in order to get a badge was too personal, too intrusive. There is not a shred of evidence in the record that JPL could have altered --- or even influenced --- that requirement. Indeed, it is undisputed that NASA was even *administering* the background checks itself. GC Exh. 3 at pp. 6-7 (describing how ***NASA*** obtained the relevant personal information for each contractor's employee, sent out questionnaires, ran the information through federal databases, and determined suitability for a security clearance).

II. THE CHARGING PARTIES' LAWSUIT IS NOT PROTECTED.

The GC claims that the Charging Parties' emails were also protected as a logical outgrowth of a protected lawsuit. But the Charging Parties' lawsuit was ***against NASA***. Not JPL. The GC has failed to identify any authority for his novel argument that a lawsuit against a third party is protected.

The GC's opposition tries to sidestep that problem by inaccurately recasting JPL's position on this issue: "[JPL] asserts that the lawsuit should lose protection because it ***included*** third parties."[1] The GC then argues the issue of whether including additional parties changes the nature of an otherwise protected lawsuit. But that is not JPL's argument, nor is it what happened here. JPL (Caltech) was promptly dismissed from the lawsuit in January 2008, and the case

[1] Opposition at 7 (emphasis added).

proceeded against NASA only.[2] As a result, the Charging Parties litigated ***not*** with their employer, but with a third party. The Act does not protect that.

The GC also argues that the lawsuit was protected because the badging program potentially affected the job security of JPL employees.[3] But that argument fails for the same reason. Since the lawsuit was not against JPL, any effect on job security is irrelevant. Moreover, to the extent job security could have been jeopardized, that was purely a function of ***NASA's*** decision to bar unbadged employees from accessing JPL's site. Since it was not within JPL's control, it cannot be a term or condition of the Charging Parties' employment ***with JPL***.

III. *EASTEX* DOES NOT APPLY.

JPL's brief showed that, although *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), extends protection to efforts to improve the well-being of workers outside the immediate employee-employer relationship, that protection is finite in two ways that apply here. ***First***, *Eastex* does not extend to speech that is "purely political." *Id.* at 570, n.20. The Charging Parties advocated that NASA change its mind and forgo the badging right it had just won from the Supreme Court. Tr. 176:5-18 (1/23). They expressed a specific political agenda directed at one particular agency of the federal government. The Supreme Court having already decided their case against them, their message was a targeted appeal that was not the kind of broad advocacy of worker interests that the Supreme Court found the minimum wage and right-to-work topics in *Eastex* to be. The emails were purely political and therefore outside the Act's protection.

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[2] *See* Order Granting Defendant California Institute of Technology's Rule 12(b)(6) Motion to Dismiss at pp. 3-4 (*Robert M. Nelson, et al. v. Nat'l Aeronautics and Space Admin., et al.*, CV 07-5669 ODW (VBKx)) (January 16, 2008).

[3] Opposition at 8.

Second, Justice White's concurring opinion in *Eastex* cautioned against extending the protections of the Act to situations in which a divided public might infer that the employer "supports one side or the other." *Eastex* at 579. The Charging Parties sent their personal, political views using ***government*** email addresses to 7,300-plus recipients who had no way of knowing that the emails were not sanctioned by JPL. Recipients could have easily concluded that JPL was announcing a position on the controversial issue of HSPD-12. It is one thing to allow workers to distribute literature to other employees on nonworking time in nonworking areas, as happened in *Eastex*. It is quite another to allow employees to widely disseminate the impression that their views are sanctioned by their employer – the very thing that Justice White cautioned against.

The GC's opposition completely ignores the limitations of *Eastex*. In fact, the GC's only substantive response regarding *Eastex* is to claim that "'lobbying' related to employees' terms and conditions is protected by the Act ... *see e.g.*, *Eastex, Inc. v. NLRB* ...." Opposition at 21. That is an incorrect statement of the law and *Eastex*. *Eastex* does not address lobbying. More importantly, the Act does not protect those who use government resources to lobby the government --- a serious violation of the strict limitations placed on federal contractors by the Byrd Amendment. Far from being protected, the Charging Parties' conduct in using government resources to lobby NASA was unlawful, and the discipline was therefore ***necessary***.

IV. JPL CONSISTENTLY ENFORCED ITS SPAM POLICY.

The GC claims JPL disparately treated the Charging Parties because it tolerated other emails announcing JPL-sponsored events (such as holiday parties, and ice cream socials), and communicating routine workplace messages (such as lost and found items, and birth announcements). But this is the same situation presented in *The Register-Guard,* 351 NLRB 1110 (2007) *enf'd. in part sub nom. Guard Publishing v. NLRB,* 571 F.3d 53, 387 U.S. App.

D.C. 53 (D.C. Cir. 2009). There, the employer disciplined an employee for using company email to send emails urging employees to wear union green, and to participate in the union's local parade entry. The employer's defense was that the emails solicited support for an outside organization, which was prohibited by company policy. However, it *had* tolerated "personal employee e-mails concerning social gatherings, baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking." *Id.* at 1119. The Board found no disparate treatment. It reasoned that emails soliciting support for an outside organization are not "of a similar character" to emails announcing social gatherings and services, and so they were not required to be treated the same. *Id.* at 1118.

So too here. There is an obvious difference between emails that espouse a specific political agenda vis-a-vis NASA, and those that alert employees to routine workplace matters like social gatherings and food in the break room. If the latter category of announcements is deemed to preclude JPL's limitations on the use of the email system, then no employer in the country (including the NLRB) could lawfully restrict use of its email system. The GC's opposition --- like Judge Kocol's ruling --- ignores the teaching of *Register Guard* and instead treats JPL's tolerance of *any* type of "personal" email as fatal.

There are only five emails that did not fit into the two categories discussed above (JPL-sponsored events or routine workplace messages). Of course, such a small number of "uncaught" emails is meaningless. It is well-established that "occasional lapses in enforcement," such as these five instances, do not deprive an employer of the right to enforce its rules. *Hertz Rent-A-Car*, 305 NLRB 487, 488 (1991). Moreover, as to each of the five, JPL showed that Human Resources had no knowledge of the email before the hearing (and would have

investigated and issued discipline if it ***had*** known).[4] This is consistent with JPL's established practice of disciplining for spam email that Human Resources learns about. JPL provided undisputed evidence of those disciplines, which Judge Kocol ignored and the GC criticized merely because JPL did not find more than three[5] such cases.

The evidence also showed that JPL *had* to enforce its policy in this case because the Charging Parties gave NASA a front row seat for their misconduct by sending the email ***to NASA***.[6] The GC ignores this key point. He focuses instead on two issues that are entirely off-topic: First, the GC criticizes JPL for adding up the total number of the recipients of the Charging Parties' emails on the ground it is evidence that they were disciplined collectively. But the concerted nature of the Charging Parties' misconduct has never been disputed and, regardless, the fact that conduct is concerted does not make it protected. Second, the GC criticizes JPL's written warnings for paraphrasing (rather than quoting verbatim) JPL's Use of

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[4] As to the one email chain of which Livesay was aware (the United Way replies), she testified to why she did not contact Human Resources or recommend discipline in that unique situation. The only reason the employees were able to send unsolicited replies was because of an error made by a member of her technology team, and she felt that was not the employees' fault. Tr. 647:25-653:24 (1/25).

[5] The GC's opposition incorrectly states that JPL produced "only two disciplines" (Opposition at 27) but then goes on to describe each of the ***three*** disciplines JPL produced.

[6] This, of course, is why NASA's receipt of the emails is relevant. The GC claims that "the evidence simply does not support" "that the emails at issue . . . were sent . . . to various individuals at NASA headquarters." (Opposition at 11.) That is just false. At trial, Counsel for the GC stipulated that the lists of email recipients (Joint Exhibits 3-6) were true and correct, and Hart's and Livesay's undisputed testimony established that the recipients included several NASA Headquarters employees, including high-ranking program executives. To the extent the GC argues about which Charging Parties sent emails to NASA and how many NASA personnel in total received them, that is just noise. The point is that NASA executives with discretion over JPL's programs knew of the misconduct. JPL certainly could not ignore it.

Resources Policy.[7] But focusing on the wording of the warnings misses the point of whether the discipline was proper in the first place. Moreover, no authority holds that policies cannot be paraphrased in disciplinary documents.

V. NELSON WAS DISLOYAL.

Nelson's January 21 email impugning the character of NASA officials, and accusing that agency of illegal conduct, was disloyal under *NLRB v. IBEW Local 1229* (*Jefferson Standard*), 346 U.S. 464 (1953). Judge Kocol erred by refusing to find the email disloyal on the ground that it did not disparage JPL's *product* (only its sole customer on which it depends for its very existence). There is no legal basis for drawing a distinction between an attack on JPL's ***product,*** and an attack on JPL's indispensable ***customer*** (arguably an even worse form of disloyalty). JPL cited myriad cases establishing that the customer relationship is at the core of the *Jefferson Standard* doctrine; it is not limited to product disparagement. The GC's opposition ignores all of those cases, and merely reiterates Judge Kocol's flawed view that *product* disparagement is somehow required.[8] Opposition at 19. It is not.

JPL's brief also showed that Nelson's email was unprotected for an additional reason: It made no reference to any labor dispute between JPL employees and JPL.[9] That is a necessary

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[7] The GC makes the same argument with regard to the Charging Parties' violations of JPL's Ethics and Business Conduct Policy Section 2.2, which bans "JPL employees [from] us[ing] their JPL positions in a manner which is motivated by the desire for personal gain . . . ." The GC and Judge Kocol have criticized the written warnings for failing to include the phrase "personal gain" in quoting this policy. Here again, JPL need not quote the entire policy verbatim to establish that the Charging Parties violated it.

[8] The GC's opposition makes this argument with regard to the Charging Parties' January 27th email as well. But JPL has never contended that the January 27th email was disloyal.

[9] This failure to connect the email with a labor dispute is also why Judge Kocol is wrong to insist that JPL must prove Nelson's statements were maliciously false (under *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) and *Letter Carriers v. Austin*, 418 U.S. 264 (1974)). That line of labor cases involved speech that revealed on its face that a labor dispute was involved.

prerequisite for a disparaging message to be protected. *See e.g.*, *Mountain Shadows Golf Resort,* 330 NLRB 1238, 1240 (2000). There was no labor dispute here, let alone a reference to one in the email. The GC does not address this point at all in the opposition.

VI. BYRNES'S SIGNATURE BLOCK IS NOT PROTECTED.

The GC contends that Byrnes's signature block (attributing badging-related comments to JPL's Manager of Security and Deputy Director) was also protected because it addressed badging and because it was a logical outgrowth of the HSPD-12 lawsuit. But as described already, the badging program was not a term or condition of the Charging Parties' employment with JPL, and the lawsuit is not protected. His signature block was therefore unprotected, and it rightly led to further discipline.

VII. CONCLUSION

For all of the reasons described above, JPL respectfully requests that the Board dismiss the complaint in its entirety.

Respectfully Submitted,

PAUL HASTINGS LLP
J. AL LATHAM, JR.
CAMERON W. FOX

By: _____
CAMERON W. FOX

Attorneys for Respondent
CALIFORNIA INSTITUTE OF TECHNOLOGY
JET PROPULSION LABORATORY

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
CITY OF LOS ANGELES AND COUNTY OF LOS ANGELES)

I am employed in the City of Los Angeles and County of Los Angeles, State of California. I am over the age of 18, and not a party to the within action. My business address is 515 S. Flower Street, 25th Floor, Los Angeles, CA 90071-2228.

On September 6, 2013, I served the foregoing document(s) described as: **JET PROPULSION LABORATORY'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM G. KOCOL** on the interested parties by electronic service as follows:

Scott Maxwell
1045 Sinaloa Ave.
Pasadena, CA 91104
marsroverdriver@gmail.com

Larry D'Addario
3795 Cartwright Street
Pasadena, CA 91107
larry9850@gmail.com

Robert Nelson
775 N. Mentor Ave.
Pasadena, CA 91104
RMNelson2@earthlink.net

Dennis Byrnes
42720 Nelder Heights Drive
Oakhurst, CA 93644
dbyrnes@sti.net

Counsel for the Acting General Counsel
John Rubin
Counsel for the Acting General Counsel
National Labor Relations Board
Region 31
11150 W. Olympic Blvd., Suite 700
Los Angeles, CA 90064
John.Rubin@nlrb.gov

E-FILE
Gary W. Shinners, Acting
Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
www.nlrb.gov

William Bruce Banerdt
2207 East Dudley Street
Pasadena, CA 91104
banerdt@earthlink.net

☒ **VIA EMAIL:**

The email transmission was complete and without error. The email was transmitted to the email addresses listed above on September 6, 2013.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 6, 2013, at Los Angeles, California.

Christine Wilson